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IN THE

Supreme Court of the United States

OF AMERICA

No. 936

RALPH J. FESTA,
Petitioner

vs.

CITY OF PORTSMOUTH

Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of Appeals of the Commonwealth of Virginia

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QUESTIONS PRESENTED FOR REVIEW

1. Should the Petition for Writ of Error be dismissed?
2. When petitioner had a formal hearing before the Civil Service Commission in full conformity with due process of law, did the failure of petitioner to have a formal hearing before the City Manager at an earlier stage of the proceedings deny him due process of law as guaranteed by the Fourteenth Amendment of the Federal Constitution?
3. Was the dismissal of petitioner based upon evidence outside the record so as to deny him due process of law as guaranteed by the Fourteenth Amendment of the Federal Constitution?
4. Did the exclusion of the Chief of Police from the order separating witnesses to assist the respondent in the presentation and conduct of its case deny petitioner due process of law as guaranteed by the Fourteenth Amendment of the Federal Constitution?
5. Was petitioner denied due process of law as guaranteed by the Fourteenth Amendment of the Federal Constitution by the refusal of the Clerk of the Court of Hustings for the City of Portsmouth to certify and include a transcript of statements made before the City Manager as a part of the record?

STATEMENT OF THE CASE

By letter from the City Manager of the City of Portsmouth dated September 13, 1967 petitioner was suspended from the Portsmouth Police Department effective September 7, 1967 pending investigation. By letter dated Septem-

ber 21, 1967 the City Manager advised the petitioner that his dismissal had been recommended based upon the charges set forth therein and that he could appear and reply to the charges September 29, 1967. After continuance, the petitioner appeared in the office of the City Manager on October 3, 1967 accompanied by counsel and in the presence of the City Manager replied unsworn to the charges made and introduced statements in his behalf. No witnesses were presented by respondent or petitioner. By letter dated October 6, 1967, petitioner was dismissed by the City Manager effective September 7, 1967, based on the charges set forth therein.

In accordance with established procedure and as a matter of right, petitioner appealed the decision of the City Manager to the Civil Service Commission of the City of Portsmouth. On November 1, 1967, a de novo public hearing was held by the commission at which the respondent presented all evidence relied upon and at which petitioner appeared, represented by counsel, and presented all evidence in his behalf and exercised his full right of cross-examination.

At the hearing before the Civil Service Commission, Colonel H. P. Crowe, Chief of Police, was excluded from the rule to separate witnesses. Colonel Crowe was the lead witness for the respondent and after testifying, he remained at the table with counsel for the respondent and assisted counsel in the presentation and conduct of respondent's case.

One of the charges against petitioner was that he had improperly granted overtime leave to one Officer Sumner when he had no overtime due. During the course of his

testimony, Colonel Crowe testified with respect to information obtained for an examination and comparision of certain departmental time records. (Transcript: Page 39, Line 24; Page 41, Line 12). The subject records consisted of captain of the watch time sheets, captain of the watch work record and the official time log. (Transcript: Page 40, Lines 12-14; Page 41, Lines 3-5).

On direct examination of Colonel Crowe, the four pertinent captain of the watch time sheets were identified and explained (Transcript: Page 31, Lines 11-25) and introduced into evidence as repondent's Exhibits 2-5. (Transcript: Page 37, Line 12; Page 38, Line 6; Page 39, Line 1; and Page 39, Line 17). Although the pertinent captain's work record and time log were not formally introduced on direct, they were introduced on cross-examination at the suggestion of petitioner's counsel (Transcript: Page 66, Lines 4-14) as follows:

> "WITNESS: Mr. Chairman, I have not testified to any records that are not readily available.
>
> MR. MOODY: I would like to see them if they are available. (Witness hands folded to Mr. Williams).
>
> WITNESS: This is Captain Festa's work sheet; this is Officer Sumner's record. This is a photostat we made the 17th of August. This is the captain's work sheet and I have to assume that he transposes the information from here to here."

The fact that the records introduced were those upon which Colonel Crowe had based his previous testimony was confirmed on redirect (Transcript: Page 67, Lines 3-9), and the commission then recessed to consider the records introduced (Transcript: Page 67, Lines 10-17) in the following manner:

"EXAMINED BY MR. MORRIS:

Q. Colonel Crowe, was the testimony that you gave with reference to the holidays of Officer Sumner and overtime and leave time based on these records?

A. These records, yes, sir. We can compare them here.

THE CHAIRMAN: We will do this at a later time, not at this particular time. We would like to have this available to us.

WITNESS: This is the official time log here. This is something that I would like to take back with me because we have to have it tomorrow.

THE CHAIRMAN: We will take a recess right now and look at these records."

On direct examination Colonel Crowe also testified that it was the responsibility of the captain of the watch to maintain the time sheets (Transcript: Page 31, Lines 19-22) and that the captain of the watch was in charge of granting leave. (Transcript: Page 41, Lines 16-18). In expanding upon previous testimony in answer to a question of Commissioner Stewart, Colonel Crowe also mentioned that he had written an order to that effect. (Transcript: Page 42, Line 1-9).

During the hearing, statements made by certain witnesses and relied upon by respondent were entered in evidence by stipulation and counsel for petitioner cross-examined on the basis of the statements introduced. (Transcript: Page 117, Lines 3-21; Page 140, Lines 13-20; Page 144, Lines 14-17; Page 147, Lines 5-12; Page 263, Lines 18-20).

Also during the hearing, at the suggestion of counsel for petitioner, the commission indicated it would examine petitioner's permanent personnel record for certain letters of commendation and place them in evidence for petitioner. (Transcript: Pages 68-70).

After hearing all the evidence, the commission postponed decision and the hearing was adjourned. On November 8, 1967 the commission rendered its decision concurring in the action of the City Manager.

On November 17, 1967 petitioner filed his Notice of Appeal of the commission's decision to the Court of Hustings for the City of Portsmouth in which he alleged certain grounds of appeal. Petitioner did not specifically or directly allege violation of the due process clause of the Federal Constitution therein. After review, the Court of Hustings for the City of Portsmouth filed a written opinion dated February 17, 1968 affirming the decision of the Civil Service Commission and final judgment was entered March 7, 1968.

On April 10, 1968 petitioner filed Notice of Appeal and Assignments of Error to the judgment of the Court of Hustings for the City of Portsmouth in which petitioner alleged for the first time denial of due process in violation of the Fourteenth Amendment of the Federal Constitution. Petitioner subsequently filed his Petition for Writ of Error with the Virginia Supreme Court of Appeals and on October 16, 1968 the Court denied petitioner's Petition for Writ of Error.

ARGUMENT I

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DISMISSED.

The Petition for Writ of Certiorari heretofore filed by the petitioner should be dismissed on the following grounds:

A. The Judgment Of The Virginia Supreme Court Of Appeals Rested Upon Independent And Adequate Non-federal Grounds.

Although the Virginia Supreme Court of Appeals delivered no written opinion in denying petitioner's Petition for Writ of Error, the judgment of the Court can be sustained on independent and adequate non-federal grounds. (See respondent's Arguments II.A, III, and IV). "Where the highest court of the state delivers no opinion and it appears the judgment *might* have rested upon a non-federal ground, this Court will not take jurisdiction to review the judgment." *Steimbridge v. Georgia*, 343 U. S. 541 at 547 (1952). If the judgment of the state court is fairly and substantially supported on non-federal grounds and there is no indication of an attempt to evade constitutional issues its decision is not reviewable by the Federal Supreme Court.

Wolfe v. State of N. C., 364 U. S. 177 (1960).

Holley v. *Lawrence*, 317 U. S. 518 (1943), appeal dismissed 317 U. S. 605 (1943).

B. The Averments of Petitioner Present No Substantial Federal Question.

The asserted federal questions of the petitioner are devoid of merit and unsubstantial either because precluded by previous authority or because of their frivolous nature. (See respondent's Arguments II, III and IV). In such cases a motion to dismiss is properly allowed. *Deming v. Carlisle Packing Company*, 226 U. S. 102 (1912).

ARGUMENT II

PETITIONER HAD A HEARING IN FULL CONFORMITY WITH THE REQUIREMENTS OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION BEFORE THE CIVIL SERVICE COMMISSION.

On November 1, 1967, subsequent to his appearance before the City Manager and in accordance with established practice and procedure, Virginia Acts of Assembly, Ch. 246, Sec. 7, pp. 361-362 (1942), petitioner had a full and complete de novo public hearing before the Civil Service Commission of the City of Portsmouth. At this hearing respondent presented all evidence relied upon to support his dismissal and petitioner appeared, represented by counsel, and presented all evidence in his behalf and exercised in full his right to cross-examination.

The fundamental objective of due process of law is to protect rights against aribtrary action of public officials. 2 Am. Jur. 2d, Administrative Law §148 (1962). This objective was fully served through petitioner's de novo hearing before the Civil Service Commission. There is no violation of due process of law in making an administrative determination without a formal hearing if such a hearing

may be had and in fact was had upon application to an administrative tribunal.

Gonzales v. *United States*, 364 U.S. 59 (1960).

Bragg v. *Weaver*, 251 U.S. 57 (1919).

Flory v. *Smith*, 145 Va. 164, 134 S.E. 360 (1926).

It is universally held that due process of law does not require a hearing at the initial stage of a proceeding, but only that the interested party be given a hearing at some stage of the proceeding before the determination becomes final or irrevocable.

16A C.J.S., Constitutional Law, §622 (1956).

16 Am. Jr. 2d., Constitutional Law, §576 (1964).

NAACP v. *Committee*, 199 Va. 665, 101 S.E. 2d 580 (1958); vacated on other grounds 358 U.S. 40 (1958).

Ewing v. *Mytinger & Castleberry*, 339 U.S. 594 (1950).

Lichter v. *United States*, 334 U.S. 742 (1948).

A. Whether Or Not Rule 24 Required A Formal Hearing Before The City Manager Was A Question Of Construction For The State Court.

The petitioner had a complete hearing before the Civil Service Commission in accordance with established procedures, Virginia Acts of Assembly Ch. 246, Sec. 7 pp. 361-362 (1942), and in full conformity with due process requirements. Under these circumstances, whether or not Rule 24 of the Civil Service Regulations required an additional formal hearing before the City Manager in excess of constitutional requirements was merely a question of construction and interpretation in the light of other provisions. The construction of state laws is the exclusive responsibility of the state courts, *Speiser* v. *Randall*, 357 U.S. 513 (1958). What state enactments may mean and the extent

to which any provision may be limited by another are questions upon which the highest court of the state has final word, *Musser* v. *State of Utah*, 333 U.S. 95 (1948), and the state courts' construction must be accepted by the United States Supreme Court. *Cramp* v. *Board of Public Instruction of Orange County, Florida*, 368 U.S. 278 (1961). In denying petitioner's Writ of Error and affirming the judgment of the lower court, the Virginia Supreme Court of Appeals necessarily determined that Rule 24 of the Civil Service Commission Regulations did not require a formal hearing before the City Manager and thus conclusively resolved the issue against petitioner.

ARGUMENT III

THE EXCLUSION OF ONE WITNESS FROM THE ORDER OF SEPARATION TO ASSIST RESPONDENT IN THE PRESENTATION OF ITS CASE WAS IN THE DISCRETION OF THE HEARING TRIBUNAL AND WAS NOT VIOLATIVE OF DUE PROCESS.

Due to the nature of the issues involved the presentation of respondent's case and meaningful cross-examination necessitated ready access to detailed information with respect to the rules, orders, past practices and operations of the police department beyond the personal knowledge of counsel. Under these circumstances the exemption of the Chief of Police from the order of separation was in the discretion of the hearing tribunal.

Schoppel v. *United States*, 270 F.2d 413 (1959).
Johnston v. *United States*, 260 F.2d 345 (1958), cert. denied 360 U.S. 935 (1959).

Powell v. *United States*, 208 F.2d 618 (1953), cert. denied 347 U.S. 961 (1954).

Hampton v. *Commonwealth*, 190 Va. 531, 58 S.E. 2d 288 (1950), cert. denied 339 U.S. 989 (1950).

Burford v. *Commonwealth*, 179 Va. 752, 20 S.E. 2d 509 (1942).

The exercise of such discretion cannot be challenged unless it clearly appears from the record that discretion has been abused to the prejudice of the complaining party.

Powell v. *United States*, 208 F.2d 618 (1953), cert. denied 347 U.S. 961 (1954).

Near v. *Commonwealth*, 202 Va. 20, 116 S.E. 2d 85 (1960), cert. denied 365 U.S. 873 (1961).

Hampton v. *Commonwealth*, 190 Va. 531, 58 S.E. 2d 288 (1950), cert. denied 339 U.S. 989 (1950).

Burford v. *Commonwealth*, 179 Va. 752, 20 S.E. 2d 509 (1942).

The Chief of Police was the lead witness for the respondent. (Transcript: Page 13, Line 22). After testifying, he remained at the table with counsel for respondent and assisted counsel in the presentation and conduct of the case. The record is totally devoid of evidence that the presence of the Chief of Police served to intimidate witnesses or prejudice the rights of the petitioner. In no instance does it appear a witness was less than fully responsive. Moreover, the only evidence bearing on the issue negatives intimidation and instead reflects a scrupulous effort to avoid it. (Transcript: Page 73, Lines 7-14).

The mere assertion of a denial of constitutional guarantees standing alone is not sufficient. There must at least be color of ground for such assertion, *Hamblin* v.

Western Land Co., 147 U.S. 531 (1898), and the question presented must be a substantial one.

Honeyman v. *Hanan*, 300 U.S. 14 (1937).

Seaboard Air Line Ry. Co. v. *Watson*, 287 U.S. 86 (1932).

Deming v. *Carlisle Packing Co.*, 226 U.S. 102 (1912).

The failure of petitioner to meet either of these criteria is attested by the fact that his contention is not supported by authority.

ARGUMENT IV

PETITIONER'S DISMISSAL WAS BASED ON COMPETENT EVIDENCE PROPERLY BEFORE THE TRIBUNAL.

At the hearing before the Civil Service Commission, all evidence relied upon by respondent to support the dismissal of petitioner was presented to the commission. The record is totally devoid of evidence that the commission based its judgment on evidence other than that properly placed before it at that time. A contrary contention is founded upon no more than surmise and conjecture.

One of the charges against petitioner was that he had improperly granted overtime leave to one Officer Sumner when he had no overtime due. During the course of his testimony, Colonel Crowe testified with respect to information obtained from an examination and comparison of certain departmental records. (Transcript: Page 39, Line 24; Page 41, Line 12). The subject records consisted of captain of the watch time sheets, captain of the watch work records and the official time log. (Transcript: Page 40, Lines 12-14; Page 41, Lines 3-5).

On direct examination of Colonel Crowe the four pertinent captain of the watch time sheets were identified and explained (Transcript: Page 31, Lines 11-25) and introduced into evidence as respondent's Exhibits 2-5 (Transcript: Page 37, Line 12; Page 38, Line 6; Page 39, Line 1; and Page 39, Line 17). Although the pertinent captain's work record and time log were not formally introduced on direct, they were introduced on cross-examination at the suggestion of petitioner's counsel with his full knowledge, identified and explained (Transcript: Page 66, Lines 4-14), and confirmed to be the records upon which Colonel Crowe had based his earlier testimony. (Transcript: Page 67, Lines 3-9). The commission then recessed to consider the records (Transcript: Page 67, Lines 16-17). All of these incidents took place in the presence of counsel without objection (Transcript: Pages 66-67).

It is thus clear that the records petitioner alleges were outside of the record and improperly considered by the commission were properly placed before the commission with full knowledge of petitioner's counsel and considered by the commission during the course of the hearing. The statement of the commission, made before introduction, that it would investigate those records as far as they found it necessary was without effect.

On direct examination, Colonel Crowe also testified that it was the responsibility of the captain of the watch to maintain the time sheets (Transcript: Page 31, Lines 19-22) and that the captain of the watch was in charge of granting leave. (Transcript: Page 41, Lines 16-18). In expanding upon previous testimony and in answer to a question of Commissioner Stewart, Colonel Crowe also mentioned that he had written an order to that effect.

(Transcript: Page 42, Lines 1-9). The direct testimony of the Chief of Police was primary and competent evidence. He testified under oath to matters within his own knowledge and was fully subject to cross-examination. The mere fact that a writing has been made does not render direct evidence incompetent where proof of the writing itself is not in issue. *Doman* v. *Baltimore and O. Ry. Co.*, 125 W. Va. 8, 22 S.E. 2d 703.

When the record contains competent evidence fully sufficient to serve as a basis of decision of the issue concerned, without more, it should not be boldly assumed without support in the record that the tribunal based its decision on other evidence outside of the record. Moreover, engaging for a moment in pure speculation and conjecture with petitioner and assuming that the commission examined the written order, the petitioner could have in no way been prejudiced. If the order had been inconsistent with respondent's evidence it could only have benefited petitioner. On the other hand, if it had been consistent with respondent's evidence it would have been merely corroborative and harmless.

Under the above circumstances, if there were grounds for objection to the consideration of the evidence discussed they would relate solely to the technical "formality" of introduction and numbering of the records in the first instance and to the technical competency of the evidence in the second. But, the statutes governing hearings before the Civil Service Commission do not require compliance with technical rules of evidence. Virginia Acts of Assembly, Ch. 246, Sec. 7 pp. 361-362 (1942). Nor, are administrative tribunals generally required to comply with such rules, *Humphrees* v. *Boxley Bros. Co.*, 146 Va. 91, 135 S.E.

890 (1926); 2 Am. Jur. 2d, *Administrative Law* §344 (1962), and the mere fact that they are not followed does not render a hearing unfair, *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149 (1923), and falls far short of a denial of due process.

ARGUMENT V

THE TRANSCRIPT OF PETITIONER'S APPEARANCE IN THE CITY MANAGER'S OFFICE WAS PROPERLY EXCLUDED.

The fourth assignment of petitioner was not argued and is considered abandoned. However, even had it not been abandoned it could not stand for the following reasons:

(1) The petitioner was not under oath.

(2) The transcript was not certified by the officer before whom it was taken.

(3) The transcript did not constitute part of the record before the Civil Service Commission, or the Court of Hustings for the City of Portsmouth, or the Virginia Supreme Court of Appeals.

(4) The Clerk of the Court of Hustings for the City of Portsmouth had no authority to certify or transmit it.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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